savings clause, the Bennett court held that the case could indeed proceed in state court finding, "that [when] Congress enacted the savings clause, it obviously thought that state courts could adequately handle matters in this area."[32]

4. The Public Policy Foundations Of Section 332 Dictate That State Consumer Protection, Contract And Tort Law Claims Should Not Be Considered Preempted By Federal Law

Depriving state courts of their full range of remedies to punish unfair business practices committed by wireless telephone companies is directly contrary to the pro-competitive purposes embodied in Section 332 of the Communications Act. It was in order to foster robust competition amongst CMRS providers that the FCC elected to forbear from engaging in federal rate regulation of wireless services.[33] This same purpose was at the heart of Congressional preemption of "state rate and entry regulation of all commercial mobile services" under Section 332, which Congress enacted in order "[t]o foster the growth and development of mobile services that, by their nature, operate without regard to state lines as an integral part of the national communications infrastructure."[34] "Fostering economic growth" was thus the guiding principle in the FCC's implementation of Section 332. [35]

State laws which proscribe false advertising and other fraudulent, unfair business practices that are fundamentally anti-competitive in nature and serve to protect consumer interests are in harmony with federal policy aimed at fostering open, fair competition, in Bennett, order to enable the free forces of the competitive marketplace to function to the benefit of consumers.[36] Such state laws provide a necessary counter-weight against the economic self-interest that might otherwise be pursued by wireless service providers, and

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32 Bennett, 1996 WL 1054301, at *6.

33 Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Servs., 9 F.C.C.R. 1411, 1418 (1994) (the "Implementation Order").

34 HR. Rep. No. 103-111, at 211, 260.

35 Implementation Order, 9 F.C.C.R. at 1419-20.

36 See Bennett, 1996 WL 1054301, at *5.

discourages them from engaging in anti-competitive conduct at the expense of both new, less established entrants as well as older, more established competitors that choose not to engage in unfair business practices. The result of anti-competitive practices – which prevent the emergence of a fully-functioning, robustly competitive marketplace – are higher prices, stifled innovation, the elimination and/or lack of growth in employment and the general constriction of the benefits which the wireless telephone industry should otherwise be capable of conferring upon consumers.

A wireless company that gains market share through false and deceptive advertising subverts the pro-competitive objectives of Section 332 which are to ensure that the driving economic forces within the industry should be "technological innovation, service quality, competition-based pricing decisions, and responsiveness to consumer needs."[37] State laws which prohibit the employment of anti-competitive practices serve the same purposes and are, therefore, complimentary to the goals of Section 332 of the Communications Act.

Further, permitting plaintiffs to assert, without limitation, claims against CMRS providers involving false advertising and other fraudulent business practices is necessary to prevent the existence of a void between the zones of permissible federal and state regulation with respect to the wireless telephone industry. The Communications Act imposes no duty on telecommunications companies, for example, including wireless telephone providers, "to make accurate and authentic representations in their promotional practices."[38] Nor are any remedies provided under the Communications Act for dishonest promotions and deceptive marketing practices.[39] Accordingly, state law claims provide the only effective mechanism for deterring wireless telephone companies from engaging in false advertising and many other fraudulent business practices.

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37 Implementation Order, 9 F.C.C.R. at 1420.

38 Weinberg, 165 F.R.D. at 438; see DeCastro, 935 F. Supp. at 550.

39 Bauchelle v. AT&T Corp., 989 F. Supp. 636, 645 (D.N.J. 1997).

In summary, while Section 332(c)(3)(A) of the Communications Act bars state regulation of the entry and rates charged by wireless telephone service providers, claims challenging the fairness of consumer advertising and other business practices remain within the jurisdiction of state courts, and are consistent with the Congressional purposes for enacting Section 332.

5. Where The California Trial Court Went Wrong

As reviewed in the introduction above, the California trial court struck all of plaintiffs' requests for compensatory and punitive damages and restitution. The court's ruling was based on an overly expansive reading of Section 332(c)(3)(A) of the Communications Act. The court accepted LA Cellular's erroneous argument that the award of any form of monetary relief would be tantamount to requiring the state court to "regulate rates" of a CMRS provider, an action prohibited under that statute.

The ruling confused "rate regulation" with monetary relief against a CMRS provider that charges prices not subject to rate regulation. In so doing, the court also implicitly accepted LA Cellular's erroneous argument that the "Filed Rate" or "Filed Tariff" doctrine would be abrogated if the trial court awarded monetary damages against LA Cellular. That argument lacks merit because CMRS providers file no tariffs with either the FCC or any state agency, and consequently there are no "filed rates" or "filed tariffs" to which the doctrine can apply here.

In addition to blatantly misstating the nature of the regulation applied to CMRS providers – which are not subject to rate regulation at either the federal or state levels – LA Cellular's extrapolation and misapplication of the tenets of the "Filed Rate" doctrine eliminated the distinction between "rates" (which are fixed as the outcome of a regulatory process) and "prices" (which are determined as a result of competitive marketplace forces). LA Cellular's argument that its "prices" were actually "rates" that had been established by means of a regulatory process and thus subject to the "Filed Rate" doctrine, further muddied the waters. Thus, compounding the confusion engendered by its erroneous preemption

argument under Section 332(c)(3)(A) of the Communications Act, LA Cellular convinced the trial court of the fallacious notion that, by virtue of the "Filed Rate" doctrine, LA Cellular was protected against any action by the state court that could be construed as directly or indirectly having an impact upon LA Cellular's "rates," including any award of monetary relief against LA Cellular for claims that it had acted in violation of state consumer protection laws.

LA Cellular further jumbled the issues before the trial court by asserting that monetary damages are a remedy which, under the Communications Act, must be sought by means of filing a complaint before the FCC or by bringing an action in federal rather than state court and thus, could not properly be awarded by the state trial court.

Unfortunately, LA Cellular succeeded in its efforts to inveigle the trial court by means of the plethora of misleading and intermingled arguments it asserted, and thus the trial court ultimately concluded that the Communications Act preempted any award by the state court of monetary relief against LA Cellular.

6. The Overwhelming Weight Of Authority Holds That The Communications Act Does Not Preempt State Law Claims For False Advertising And Other Fraudulent Business Practices

While courts have addressed the issue in only a minority of states as of the present time, many Federal and state courts recognize that judicial oversight of false advertising and other fraudulent business practices does not require the courts to engage in rate-setting.[40] Virtually all authorities that have analyzed Section 332 of the Communications Act, including the FCC itself, have rejected an expansive interpretation which would hold that

[40] Rate regulation entails highly complicated procedures, which are comprised of, inter alia, establishing and/or estimating a utility's operating costs, including the costs of capital (interest rates), tax rates, the amount of financing necessary for its investments in new capital equipment, the value of its existing infrastructure, depreciation and inflation, and the determination of an appropriate rate of return which a regulated utility is entitled to earn, as well as the rates that may be charged for each class of service consonant with the approved rate of return. See, e.g., Illinois Bell Tel. Co. v. FCC, 988 F.2d 1254, 1258-59 (D.C. Cir. 1993). None of these factors would be considered in imposing damages for false advertising.

Section 332's preemptive scope reaches monetary relief for state court claims involving false advertising and other fraudulent business practices.

Particularly notable is the recent and comprehensive opinion issued by the Washington Supreme Court in Tenore. In the Tenore case, the state court of appeals reversed the trial court's finding of preemption under Section 332(c)(3)(A) of the Communications Act and dismissal of the state law false advertising claims brought against AT&T Wireless arising from AT&T Wireless' failure to disclose its billing practice of "rounding up" charges to the next full minute. Defendant AT&T Wireless advanced the identical preemption argument as it and LA Cellular recently argued before the California trial court in LA Cellular. In rejecting that argument the Tenore court unanimously held:[41] [42]

> The language of Section 332 itself, contained in the "terms and conditions" clause, limits the preemptive reach of that provision. ... A court may award damages [for false and deceptive advertising] without it constituting rate making.

The Tenore court's reasoning is illuminating. The Court rejected AT&T Wireless' contention that claims of false advertising were within the special expertise of the FCC, and thereby preempted, concluding:[43]

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[41] Tenore, 962 P.2d at 117.

[42] The following cases, although not involving claims of false advertising, narrowly interpreted the preemptive scope of Section 332 of the Communications Act and upheld the state regulation at issue: Cellular Telecomms., 168 F.3d at 1336 (state law requiring wireless telephone companies to contribute to state-administered universal service funds did not constitute rate regulation under Section 332); GTE Mobilnet v. Johnson, 111 F.3d 469, 479 (6th Cir. 1997) (state law barring anti-competitive conduct within the wireless telephone industry not preempted by Section 332); Mountain Solutions v. State Corp. Comm'n, 966 F. Supp. 1043, 1048 (D. Kan. 1997) (Section 332(c)(3)(A) exists in harmony with other state regulation, including regulation that may require rates to increase "as costs are passed on to customers"), aff'd sub nom. Sprint Spectrum, L.P. v. State Corp. Comm'n, 149 F.3d 1058 (10th Cir. 1998); Esquivel v. Southwestern Bell Mobile Sys., 920 F. Supp. 713, 716 (S.D. Tex. 1996) (concluding that a billing practice of charging liquidated damages for early termination of service is a "term and condition[]" of the agreement, rather than a rate, and therefore may be regulated by the state and is not completely preempted by Section 332(c)(3)(A)).

[43] Tenore, 962 P.2d at 116 (footnote omitted).

> [T]here is no conflict between the authority of the FCC and that of a court in deciding whether AT&T's advertising practices are misleading. As in Nader [v. Allegheny Airlines, 426 U.S. 290 (1976)], Appellants in this case do not challenge the reasonableness of AT&T's underlying practice of rounding its call charges. Also, although the FCC enacted the preemption provision in Section 332 to promote uniformity, it did so primarily to prevent burdensome and unnecessary state regulatory practices, and not to subject the CMRS infrastructure to rigid control. Nor does the FCC have exclusive authority over advertising and billing practices, if at all.

The Tenore court similarly rejected AT&T Wireless' argument that an award of monetary damages would require the court to engage in rate regulation in conflict with Section 332(c)(3)(A) of the Communications Act. The Tenore court relied upon the U.S. Supreme Court's decision in Nader.[44] In Nader, the plaintiff contested the nondisclosure of "overbooking," not the practice itself. The airline claimed that any action for damages for misrepresentation would attack the reasonableness of federally regulated rates. The U.S. Supreme Court rejected the defendant airline's argument and concluded that the action "does not turn on a determination of the reasonableness of a challenged practice."[45] Further, any "impact on rates that may result from the imposition of tort liability ... would be merely incidental."[46] Accordingly, the Tenore court held:[47]

> There is sufficient reliable authority for this Court to conclude that the state law claims brought by Appellants and the damages they seek do not implicate rate regulation prohibited by Section 332 of the [Communications Act]. The award of damages is not per se rate regulation, and as the United States Supreme Court has observed, does not require a court to "substitute its judgment for the agency's on the reasonableness of a rate." Any court is competent to determine an award of damages.

On February 22, 1999, the United States Supreme Court denied AT&T Wireless' petition for a writ of certiorari in Tenore. Across the nation, commentators observed that the

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44 Nader v. Allegheny Airlines, 426 U.S. 290 (1976).

45 Id. at 305.

46 Id. at 300.

47 Tenore, 962 P.2d at 115 (quoting Nader, 426 U.S. at 299) (footnote omitted).

U.S. Supreme Court's action signaled that state law claims of false advertising against the wireless telephone industry are not preempted by Federal law:[48]

> The high court's refusal to hear the case means the state court can proceed to the central question of whether AT&T has misled its customers through its billing practices. It also opens AT&T and other wireless companies to pending and future suits in other states.

Another quite recent opinion filed March 16, 1999 by the D. C. Circuit Court of Appeals in Cellular Telecomms.,[49] which affirmed the FCC's decision in Pittencrieff,[50] also supports a narrow reading of Section 332(c)(3)(A), consistent with the wording of the statute itself, its legislative history and the FCC's interpretation of this section of the Communications Act. In this case, the issue for determination was whether a Texas law requiring all providers of telecommunications services, including wireless telephone companies, to contribute to state-administered universal service funds, constituted impermissible state rate regulation under Section 332. The FCC had concluded in the underlying decision that the "rates charged by" language of Section 332(c)(3)(A) solely prohibited "states from prescribing, setting, or fixing rates" of wireless telephone providers, none of which the FCC contended the Texas law accomplished.[51]

The appellate court confirmed the propriety of the FCC's interpretation of the "rates charged by" language of Section 332(c)(3)(A) and the Commission's overall reasoning in the Pittencrieff decision, noting that the Cellular Telecommunications Industry Association (the "CTIA") was wrong in contending that, "the Texas contribution requirements are impermissible rate regulation because they increase the wireless service provider's costs of doing business in the state and thus impact the rates charged to customers."[52] In pointing out

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48 Mike Mills, Cell-Phone Billing Suit To Proceed; High Court Doesn't Halt Rounding Case, Washington Post, Feb. 23, 1999, Appendix Ex. 9.

49 Cellular Telecomms., 168 F.3d at 1336.

50 Pittencrieff, 13 F.C.C.R. 1735.

51 Pittencrieff, 13 F.C.C.R. at 1737, 1745.

52 Cellular Telecomms., 168 F.3d at 1336.

the erroneous nature of the CTIA's argument, the D.C. Circuit Court of Appeals wisely reached a conclusion of particular relevance to this Petition:[53]

> **One might say the same about** local siting laws or **state consumer protection laws. They too increase the cost of doing business. Yet a House Committee cited these laws as examples of the variety of *permissible* regulation of the "other terms and conditions."** See H.R. Rep. No. 103-111, at 261 (1993), reprinted in 1993 U.S.C.C.A.N. 378, 588. The Commission offered other such examples, including some drawn from its previous decisions. **To equate state action that may increase the cost of doing business with rate regulation would, the Commission reasonably concluded, forbid nearly all forms of state regulation, a result at odds with the "other terms and conditions" portion of the first sentence.**

It is also valuable to note that even in the context of cases involving rate regulated telecommunications companies that filed tariffs with the FCC (unlike CMRS providers), courts have held that state law claims for fraud and deceit arising from a carrier's failure to disclose charges for uncompleted calls did not conflict with the Communications Act nor "require agency expertise for their treatment and are 'within the conventional experience of judges.'"[54] Similarly in Weinberg,[55] the defendant allegedly used deceptive and misleading advertising and promotional practices, failing to disclose its practice of "rounding up" the time charged to the next full minute. The court concluded:[56]

> The suit does not challenge Sprint's provision of services or its tariff rates, nor does it dispute the calculation of those rates. Instead, plaintiff's state law claims relate to Sprint's advertising practices.

In Bruss,[57] plaintiffs brought a class action alleging that defendant overcharged long-distance subscribers. The court held that none of plaintiff's common law fraud and statutory

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53 Id. (bold emphasis added only).

54 In re Long Distance Telecomms. Litig., 831 F.2d 627, 633 (6th Cir. 1987) (quoting East Conference v. United States, 342 U.S. 570, 574 (1952)).

55 Weinberg, 165 F.R.D. at 434.

56 Id. at 438 (footnote omitted).

57 Bruss Co. v. Allnet Communication. Servs., 606 F. Supp. 401 (N.D. Ill. 1985).

deceptive practices claims "conflicts with provisions of the Communications Act or interferes in any way with the regulatory scheme implemented by Congress."[58]

And in Kellerman,[59] plaintiffs brought suit against their long distance carriers for breach of Illinois' consumer fraud and deceptive trade practice acts, alleging that defendant's advertising practices constituted breach of contract and common-law fraud. The court found that plaintiffs were attempting to hold the defendant to the same standards as any other business that engages in false advertising, and held:[60]

> The prosecution of these claims will in no way interfere with the delivery of long-distance telephone service to defendant's customers, and any possible effect the litigation could have on defendant's telephone rates is speculative at best. Finally, no Federal statute or regulation has been brought to our attention which would expressly prohibit these actions.

Similarly, after the 1993 amendment to Section 332 of the Communications Act, Federal courts have uniformly held that state claims seeking redress from wireless telephone service providers for a defendant's false advertising practices under state consumer protection statutes are not preempted. As noted above, in Bennett,[61] the plaintiff challenged a wireless telephone service provider's failure to disclose its practice of rounding up charges for airtime. The court observed that "a commonsense reading of the complaint in this case suggests that the state law claims relate to the failure to disclose rather than rates or service." [62] The court specifically rejected the argument that LA Cellular and AT&T Wireless recently made before the California trial court:[63]

> Clearly, Congress could have completely preempted state law by stating that § 332(c)(3)(A) would preempt any state law that related to the rates charged by commercial mobile service providers, if it so desired. However, Congress chose to only prohibit the regulation of those rates by the states. In

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58 Id. at 411.

59 Kellerman v MCI Telecomms. Corp., 493 N.E. 2d 1045 (1986).

60 Id. at 1052.

61 Bennett, 1996 WL 1054301, at *2.

62 Id. at *5.

63 Id. at *4.

> fact, § 332(c)(3)(A) does not seek to vindicate the same interests upon which plaintiff's state cause of action seeks relief. Here, the plaintiff is not contesting the rate charged, but rather is challenging Alltel's failure to disclose in its contract with consumers its practice of "rounding up" charges for airtime. Hence, this action will not affect the rates charged; instead, it may, depending on the outcome, affect the disclosure of the rates charged.

The court also rejected defendant's argument that the claims for monetary relief were preempted by federal law:[64]

> The court finds that the relief sought in the form of a refund in the difference between the amounts charged and amount consumers allegedly thought they were being charged does not confer the court with federal-question jurisdiction in that it does not relate to the rate charged or services provided, particularly when a commonsense reading of the complaint reflects the pleading of state law claims.

Further, the federal district courts in three companion cases – Sanderson , Comcast, and DeCastro[65] – each held that a claim based upon false advertising brought under the applicable state consumer protection statutes was not preempted by Section 332(c)(3)(A) of the Communications Act.[66] [67]

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64 Id. at *3.

65 Sanderson, 958 F. Supp. at 960; In re Comcast Cellular Telecomms. Litig., 949 F. Supp. 1193, 1200 (E.D. Pa. 1996); and DeCastro, 935 F. Supp. at 553.

66 See also Sanderson, 958 F. Supp. 947 (wireless telephone company's assertion that Section 332(c)(3)(A) requires removal from state court of claims under state law based on false advertising concerning billing practices rejected); DeCastro, 935 F. Supp. at 552 (state claims arising from failure to disclose billing practices "are challenging the fairness of a billing practice, not the rates themselves" and, therefore, do not conflict with Section 332(a)(3)(A)); Bennett, 1996 WL 1054301, at *3-*4 (state false advertising claim challenging failure to disclose practice of "rounding up" is not a challenge to the rate charged in violation of Section 332(c)(3)(A)).

67 Comcast, decided in Pennsylvania court, held that state law claims for breach of the implied duty of good faith and fair dealing and unjust enrichment related to billing practices were, in substance, a challenge to the rates themselves and, therefore, preempted by Section 332 of the Communications Act. 949 F. Supp. at 1203. As discussed infra, however, Sanderson and DeCastro, two companion cases to Comcast (decided in Delaware and New Jersey, respectively), rejected this portion of Comcast's holding. More importantly, in conformance with its companion cases, the Comcast court found that plaintiffs' claim under the Pennsylvania's Unfair Trade Practices and Consumer Protection Law did not constitute a challenge to rates, and was thus not preempted by Section 332. Comcast, 949 F. Supp. at 1200.

In addition, the court in Esquivel,[68] rejected the wireless telephone service providers' argument that Section 332 prohibited plaintiffs from suing under Texas common law to limit liquidated damages stipulated within defendants' service agreements. That court found that the purpose of the Texas law was "to protect consumers from excessive liquidated damages provisions that are tantamount to penalties," and held that this purpose was in accord with the "'other consumer protection matters'" under state law that were not preempted by Section 332(c)(3)(A). [69]

In summary, Section 332(c)(3)(A) does not preempt state court awards of monetary damages for claims involving false advertising and other fraudulent business practices. Certainly, defenses based on the "Filed Rate" doctrine – where there are no filed rates – cannot properly be deemed to provide a shield against the award of monetary damages. Neither LA Cellular, AT&T Wireless, nor any other wireless telephone company is required to file tariffs with the FCC, and therefore, may not rely upon case law developed under the "Filed Rate" doctrine to deny plaintiffs the full range of remedies provided under California law for false advertising and other fraudulent business practices. As explained in Tenore:[70]

> [N]ot only are there no tariffs on file, but the two purposes behind the "filed rate" doctrine preserving an agency's primary jurisdiction to determine the reasonableness of rates and insuring that only those rates approved are charged do not apply [to wireless telephone providers].

The instant LA Cellular case which provided the immediate need for the declaratory ruling sought herein, is similarly a classic case of false advertising. If liability is established, an award of monetary relief would not require a court to prescribe, set or fix wireless telephone rates. The requested declaratory ruling would help to ensure that courts throughout the nation understand this principle as a matter of law.

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68 Esquivel, 920 F. Supp. at 714.

69 Esquivel,. 920 F. Supp. at 716 (citation omitted).

70 Tenore, 962 P.2d at 110.

B. The Requested Ruling Can Prevent Confusion In The Court's Decisions

The declaratory ruling which Petitioner presently seeks from the Commission will serve to dispel the confusion reflected in the California trial court's decision and help to ensure that other Federal and state courts are not similarly misled by the kind of misstatements and mischaracterization of the law propounded by LA Cellular. Absent action by the Commission, the muddled legal notions, incorrect interpretations of the law, inapplicable and invalid legal theories and flawed definitions presented to the California trial court, which succeeded in confounding that court and forming the basis for its faulty decision, will be allowed to stand and potentially provide the support for similarly untenable decisions by other state courts. By issuing the requested declaratory ruling, however, the Commission will help to ensure that the decision ultimately rendered by the California Court on Appeal, as well as the decisions reached by other state courts called upon to adjudicate similar issues, will properly apply Section 332 of the Communications Act, and such legal principles as the "Filed Rate" doctrine, and bring such state court decisions in line with the Commission's prior decisions, the legislative history of Section 332 of the Communications Act and other relevant case law governing the issues raised in this petition.

C. The FCC Can Issue The Requested Ruling Without Delving Into The Facts Of The LA Cellular Case

Petitioner is not asking for the FCC to judge whether LA Cellular's conduct constitutes fraud or false advertising. The state court will make these findings and judgments. Likewise, Petitioner is not arguing to the FCC that it should accept Petitioner's version of the facts to support a claim for damages. The state court will make that judgment after hearing all the of the evidence and arguments presented by the parties. Rather, Petitioner is simply asking the FCC, as the agency empowered to regulate the rates of CMRS providers and to interpret the Communications Act, to declare that neither the Communications Act nor the FCC's jurisdiction serve to preempt a state court from awarding monetary relief for false advertising and other fraudulent business practices engaged in by

a wireless telephone company, and that state consumer protection laws, tort and contract claims which seek monetary relief have not been preempted by the Communications Act.

III. CONCLUSION

For the reasons set forth above, Petitioner respectfully requests that the FCC rule as follows:

- That neither the Communications Act nor the FCC's jurisdiction thereunder serve to preempt a state court from awarding monetary relief against CMRS providers for the violation of state consumer protection laws, including state laws concerning false advertising and other fraudulent business practices engaged in by CMRS providers, and/or in connection with contract disputes or tort actions involving CMRS providers.
- That the "Filed Rate" (or "Filed Tariff") doctrine has no application to the prices charged by wireless telephone companies for their services, since those prices are determined by market forces, and are not established by any rate setting regulatory process administered by the FCC or any other federal or state regulatory body. Accordingly, the "Filed Rate" (or "Filed Tariff") doctrine has no bearing upon and does not preclude a state court's ability to award monetary relief against wireless telephone companies.
- For any other ruling that the Commission determines would be just and reasonable in connection with the issues raised herein and/or in light of the circumstances surrounding this petition or otherwise.

DATED this 15th day of July, 1999

Respectfully submitted,

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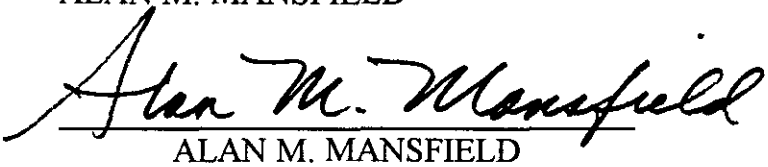

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DECLARATION OF SERVICE BY MAIL

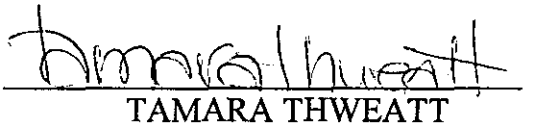
I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of San Diego, over the age of 18 years, and not a party to or interested in the within action; that declarant's business address is 600 West Broadway, Suite 1800, San Diego, California 92101.

2. That on July 15, 1999, declarant served the PETITION FOR DECLARATORY RULING by depositing a true copy thereof in a United States mailbox at San Diego, California in a sealed envelope with postage thereon fully prepaid and addressed to the parties listed on the attached Service List.

3. That there is a regular communication by mail between the place of mailing and the places so addressed.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 15th day of July, 1999, at San Diego, California.



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